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No. 04-967

In The Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

Petitioner,

v.

WILLIAM "BILL" HILL, DALLAS COUNTY
DISTRICT ATTORNEY, AS SUCCESSOR
IN OFFICE TO HENRY WADE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should the original judgment in *Roe v. Wade*, 410 U.S. 113 (1973), be vacated under Federal Rule of Civil Procedure 60(b) due to substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?

2. Is Petitioner Norma McCorvey (formerly known as Jane Roe) entitled under Federal Rule of Civil Procedure 60(b) to any relief, substantive or procedural?

3. Should the Court, at a minimum, require a hearing to afford fundamental due process that would lead to determining whether *Roe v. Wade* should be re-examined?

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OTHER SOURCES:

Justice Harry Blackmun, *Remarks Before the Franco-American Colloquium on Human Rights* 14-15 (1979) (transcript available in the Harvard Law School Library), *quoted in* Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983) 7

John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQ. L. REV. 355 (Sept. 1996) 8

Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21 (1978) 7

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Thomas F. Lambert, Jr., *Legal Rights of the Fetus*, 1 THE CHRISTIAN LAWYER 23 (Fall 1968)..... 1, 2, 9, 10

Sarah Weddington, *The Donahue Lecture Series: "Roe v. Wade: Past and Future"*, 24 SUFFOLK U. L. REV. 601 (Sept. 1990) 7

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of almost 3,000 Christian attorneys, law students, law professors, and judges. CLS has attorney chapters or fellowships in most States and accredited law schools.

From inception in 1975, the primary mission of CLS' legal advocacy and information arm, the Center for Law and Religious Freedom, has been to defend and advance the religious freedom of all Americans. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before this Court involving church-state relations.

As explained below, prior to 1992, CLS' Center did not take an official position on the issue of abortion. However, from its earliest years, CLS and its members sought to thoughtfully engage this difficult issue with wisdom and legal skill. CLS first formally addressed the issue of abortion in 1968, when its official publication, THE CHRISTIAN LAWYER, published an article that urged support for the model "Therapeutic Abortion Act" proposed by the American Law Institute ("ALI").[2] The article explained that the ALI model act would decriminalize abortion in certain narrowly defined circumstances, placing great weight upon the importance of

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[1] This *amicus curiae* brief is submitted in support of the Petitioner. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amicus* discloses that: (1) no counsel for a party authored this brief, in whole or in part; and (2) *amicus* CLS has applied to the Alliance Defense Fund (ADF) for a monetary contribution to cover expenses incurred in the preparation of this brief. ADF is a 501(c)(3) organization with offices at 15333 North Pima Road, Suite 165, Scottsdale, AZ 85260. ADF exercised no control over the content of this brief.

[2] *See* Thomas F. Lambert, Jr., *Legal Rights of the Fetus*, 1 THE CHRISTIAN LAWYER 23 (Fall 1968).

professional medical care and the strong doctor-patient relationship between a pregnant woman and her physician.[3] In 1971, THE CHRISTIAN LAWYER published a series of articles strongly questioning the morality, medical necessity, and common law precedent for such decriminalization.

Following this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), many Christian Legal Society members became involved in the pro-life movement, but CLS did not take a formal position on the issue for almost twenty years. In October 1992, following the Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the American Bar Association's unprecedented decision that year to support abortion on demand, CLS took its first affirmative pro-life position when it authorized its Center for Law and Religious Freedom to begin to undertake legal advocacy on abortion. CLS' Center therefore expanded its mission to include defending the sanctity of human life from conception to natural death. In the twelve years since that time, CLS, through its Center, has advocated on behalf of the inalienable right to life of innocent human life, from conception through natural death, in state and federal courts throughout the nation.

CLS and many of its members not only advocate on behalf of unborn human life, but also work to create a society that will embrace and care for both mother and child. To this end, CLS and many of its members have worked to help develop legal and social mechanisms that will address the needs of women who might otherwise pursue abortions. In the course of these efforts, CLS and CLS members, among other things, have supported the adoption and development of "Safe Haven" laws, discussed in detail in this brief, to enable pregnant women to surrender undesired newborn children into nurturing care rather than to terminate the child's life while unborn.

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[3] The ALI model act was included as Appendix B to the Opinion of the Court in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 182, 205-07 (1973).

Amicus CLS believes that pro-life service to women in crisis and pro-life advocacy on behalf of legal reform are expressions of our highest ideals as citizens of the United States. CLS affirms the nobility of the American democratic experiment in ordered liberty. CLS affirms the rule of law and the principle of equal protection under the law, even as it works to reform constitutional and statutory law so that the American legal system is, once again, congruent with the Founders' claim that the inalienable right to life is one of the great moral truths on which American democracy rests. CLS seeks an America that is open, hospitable, and caring – a community of civic friendship in which neighbors reach out to assist neighbors in distress. CLS believes the pro-life cause is an expression of the premise and promise of American democracy. The premise is that we are all created equal; the promise is that there is justice for all.

For all the reasons not known or considered by this Court in its *Roe* and *Casey* decisions, but now raised in an abundant and compelling testimonial and scientific record proffered below and lodged with the Clerk of this Court by the Petitioner in this case (as she was in *Roe*), *amicus* urges this Court under Federal Rule 60(b) at the very least to permit the record in *Roe* to be re-opened and a hearing granted by the district court to permit the Petitioner to show how and why the abortion license has done grave damage to America: killing tens of millions of unborn children, marginalizing fathers in our society, and, most importantly for purposes of this case, causing untold harm and anguish to mothers who have been largely denied the medical care and informed consent anticipated in *Roe* while they lost their most unique constitutional right – the right to a relationship with their child.

Accordingly, the renewal of American democracy now compels *amicus* CLS to stand for the inalienable right-to-life of the unborn and to stand with women in crisis. For the sake of our most fundamental and highest constitutional principles, CLS stands against the abortion license as it is currently authorized and practiced in this country. CLS looks to a day when every child, born or unborn, is protected in law and welcomed in life.

For these reasons, *amicus curiae* Christian Legal Society has a vital interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

This Court has indicated that when the facts supporting a constitutional decision – even a "watershed" decision such as *Roe v. Wade* – "have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," that decision should be reexamined, and modified or overruled, by this Court.[4] Yet such reexamination cannot occur unless the material facts that "have so changed, or come to be seen so differently," may be introduced into evidence before a court with authority to consider them.

Submission of evidence of significantly changed facts and factual understandings is precisely the purpose of Petitioner's underlying Rule 60(b) motion. The majority opinion in *Roe* was based upon significant number of factual assumptions that were believed true at the time but have since been proved incorrect or false. Petitioner's Rule 60(b) motion proffered voluminous testimonial, medical, and scientific evidence of such material factual changes and asked that the District Court conduct an evidentiary hearing regarding that evidence, yet the District Court summarily denied that motion.

Among the many material facts that have "changed from those which furnished the claimed justifications for the earlier constitutional resolutions"[5] in *Roe,* the enactment in forty-six states of "Safe Haven" or "Baby Moses" laws is particularly significant. These Safe Haven laws have all been enacted subsequent to the decisions in *Roe*

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[4] *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (hereinafter "Joint Opinion").

[5] *See Casey*, 505 U.S. at 863 (Joint Opinion).

and in *Casey*, and the vast majority have been enacted subsequent to *Stenberg v. Carhart*, 530 U.S. 914 (2000). Such laws afford a pregnant woman the right to safely relinquish an unwanted newborn child into proper care while remaining anonymous and without fear of criminal or civil liability. Such laws empower the recipient "safe haven" to care for the infant until turning it over to the state for adoption. These mechanisms significantly reduce the primary potential adverse effects of maternity identified by the *Roe* majority in support of its conclusion.

This Court's decisions in *Agostini v. Felton* and in *Casey* provide the critical constitutional principles that permit this Court to grant the petition. Both articulate the principle that significant changes in the facts or law underlying an earlier constitutional decision of this Court warrant revisiting and even reversing that decision.[6] *Casey* provides the corollary that such action may be required not only by changes in the facts *per se*, but also by changes in the way that such facts have come to be seen or understood.[7] Finally, *Agostini* establishes that Rule 60(b)(5) is the appropriate mechanism for a *party* to the earlier decision to seek such reexamination and reversal.[8]

Amicus Christian Legal Society therefore respectfully urges this Court to grant the petition, vacate the rulings below, and remand this case to the District Court with instructions to conduct an evidentiary hearing and determine in the first instance whether there are significant changes in the facts and factual understandings underlying the *Roe* decision that make its prospective application unjust or inequitable.

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[6] *See Agostini v. Felton*, 521 U.S. 203, 215 (1997); *Casey*, 505 U.S. at 854-55, 863 (Joint Opinion).

[7] *See Casey*, 505 U.S. at 854 (Joint Opinion).

[8] *See Agostini*, 521 U.S. at 238-40.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO PERMIT THE FEDERAL COURTS TO CONSIDER SIGNIFICANT CHANGES IN THE MATERIAL FACTS RELIED UPON IN *ROE V. WADE*.

Whenever the facts supporting a constitutional decision of this Court "have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," that decision should be re-examined by this Court.[9] Even a "watershed" constitutional decision, such as *Roe v. Wade*,[10] should be overruled or modified when justified based upon "facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."[11]

Yet such reexamination cannot occur unless the material facts that "have so changed, or come to be seen so differently," may be introduced into evidence before a court with authority to consider them. Submission of such evidence and consideration of such changed facts and factual understandings is precisely the purpose of Petitioner's underlying Rule 60(b) motion. That motion asked that the District Court conduct an evidentiary hearing regarding material factual changes that might require vacating the 1973 judgment in Petitioner's favor in the original *Roe* litigation.[12]

Petitioner's motion arises from her recognition that the relevant scientific, medical, legal, and philosophical facts as they exist and are understood today do not support the position she took nor the relief she obtained in *Roe v. Wade*, and, more significantly, do not support the majority opinion in *Roe*. The majority opinion in *Roe* was

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[9] *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (hereinafter "Joint Opinion").

[10] *Roe v. Wade*, 410 U.S. 113 (1973).

[11] *See Casey*, 505 U.S. at 863 (Joint Opinion).

[12] *See* Petitioner Norma McCorvey's *Rule 60 Motion for Relief from Judgment*, Petitioner's Appendix at 163-88.

based upon significant factual assumptions that were believed true at the time but have since been proved incorrect or false.[13] This may reflect, at least in part, the abbreviated process that the *Roe* case went through in the District Court, which ruled based upon affidavits and summary judgment motions without benefit of an evidentiary hearing, let alone a full trial.[14] As a result, most of the medical and scientific information considered by the Court and relied upon in Justice Blackmun's majority opinion was introduced for the first time in the Supreme Court,[15] or uncovered by the research of individual Justices.[16] In this

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[13] *Cf. Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) ("I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion").

[14] Roe filed suit on March 3, 1970. *See Roe*, 410 U.S. at 120. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. *See id.* at 122. The hearing on those motions took place in Dallas on May 22, 1970, and lasted just a few hours. *See* Sarah Weddington, *The Donahue Lecture Series: "Roe v. Wade: Past and Future,"* 24 SUFFOLK U. L. REV. 601, 604 (Sept. 1990). The decision of the three-judge District Court was issued less than one month later on June 17, 1970. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973). Appeals to this Court were promptly taken by both sides, although both sides also filed protective appeals to the United States Court of Appeals for the Fifth Circuit. *See Roe*, 410 U.S. at 122.

[15] *See, e.g.*, Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 37 (1978) (noting that the medical and scientific information introduced in *Roe* and *Doe* was presented for the first time at the Supreme Court level).

[16] Justice Blackmun later explained that he personally conducted much of the research for the *Roe* opinion at the Mayo Clinic library:

> I traced down, as I hoped to be able to do, the attitudes toward abortion of the American Medical Association (it had changed over the years), of the American Public Health Association, and of the American Bar Association. I wished, furthermore, to study the history of our state abortion statutes, and I wished to ascertain the origin and extent of acceptance of the Hippocratic Oath. That research, personally and very privately performed, was, I believe, rewarding.

Justice Harry Blackmun, *Remarks Before the Franco-American Colloquium on Human Rights* 14-15 (1979) (transcript available in the

(Continued on following page)

respect, Petitioner's Rule 60(b) motion seeks to permit the development of the full factual record that should have been developed in the original litigation of this matter.[17]

The voluminous evidence that Petitioner proffered to the District Court demonstrates that these material facts and factual understandings have significantly changed since this Court issued its decision in *Roe* in 1973, and indeed even since the subsequent decisions in *Planned Parenthood v. Casey* and in *Stenberg v. Carhart*, 530 U.S. 914 (2000). Yet the District Court neither held an evidentiary hearing, nor considered any of this evidence, finding that Rule 60(b)(5) did not permit any relief after the passage of so many years.[18] The District Court's failure to hold a hearing or consider this evidence is itself a denial of constitutional due process.[19] Further, the District Court's treatment of Rule 60(b)(5) is inconsistent with this Court's

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Harvard Law School Library), *quoted in* Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 723 n.34 (1983). *See also* Lisa R. Hasday, *The Hippocratic Oath As Literary Text: A Dialogue Between Law and Medicine*, 2 YALE J. HEALTH POL'Y, L. & ETHICS 299, 306-09 (March 2002) (describing scholarly criticism of analysis of Hippocratic Oath relied upon in *Roe* majority opinion); John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQ. L. REV. 355, 383-85 (Sept. 1996) (same).

[17] *Amicus* expects that, if this Court grants the petition and permits the Rule 60(b) motion to proceed in District Court, substantial evidence will be submitted not only by Petitioner, but also by intervenors and *amici* on both sides of the issue. This will result in the development of an extensive factual record that will greatly aid the District Court, Court of Appeals, and ultimately this Court in carrying out their respective responsibilities under *Casey* and *Agostini*.

[18] *McCorvey v. Hill*, 2003 WL 21448388 (N.D. Tex. June 19, 2003), Pet. App. at 21-25. *Cf. Planned Parenthood v. Casey*, 510 U.S. 1309, 1313-14 (Souter, Circuit Justice 1994) (noting, in denying plaintiffs' application for stay of Court of Appeals' mandate pending petition for *certiorari*, that plaintiffs "had been given a fair opportunity to develop the record in the District Court" where "the original District Court opinion . . . contains 287 detailed findings of fact and carries every indication that the applicants were given broad latitude to introduce evidence, call witnesses, and elicit testimony").

[19] *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970).

statements that such an effort by a party to seek relief from prospective application of the earlier judgment is a "proper application of Rule 60(b)(5),"[20] particularly where, as here, there has been "a significant change either in factual conditions or in law."[21]

The path that Petitioner has recently followed in evaluating the facts and factual understandings regarding this issue is in many respects similar to the path taken by *amicus* Christian Legal Society. For many years, the Christian Legal Society did not take an official position on the issue of abortion. CLS first formally addressed the issue of abortion in 1968, when its official publication, THE CHRISTIAN LAWYER, published an article that supported the model "Therapeutic Abortion Act" proposed by the American Law Institute ("ALI").[22]

As the article explained, the ALI model act decriminalized abortion in certain narrowly defined circumstances, placing great weight upon the importance of professional medical care and the strong doctor-patient relationship between a pregnant woman and her physician.[23] The ALI proposal "[did] not authorize abortion on demand" but rather recognized that abortion would be justifiable "only before viability" and only in three types of cases: (1) when there is a substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) when there is a substantial risk

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[20] *See Agostini v. Felton*, 521 U.S. 203, 238-40 (1997).

[21] *See id.* at 215, *citing Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) (appropriate to grant a Rule 60(b)(5) motion when the party seeking relief can show "a significant change either in factual conditions or in law").

[22] *See* Thomas F. Lambert, Jr., *Legal Rights of the Fetus*, 1 THE CHRISTIAN LAWYER 23 (Fall 1968) (hereinafter *"Legal Rights of the Fetus"*). This ALI model act had been adopted in some form in fourteen states at the time *Roe* was decided, and was included as Appendix B to the Opinion of the Court in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 182, 205-07 (1973).

[23] *See* 1 THE CHRISTIAN LAWYER at 29.

that the child would be born with grave physical or mental defect; and (3) when the pregnancy resulted from rape, incest, or other felonious intercourse.[24]

Based upon the factual information available in 1968, the *Legal Rights of the Fetus* article also spoke of "a mounting consensus in the United States that the traditional abortion law is unnecessarily strict, even Draconian, and should be liberalized." It suggested that "progress may pursue the line of advance of moving first to the ALI position and thereafter as awareness of social and moral claims is enlarged to the [more liberal American College of Obstetricians and Gynecologists] position."[25] Summarily dismissing objections to such abortion proposals as a "parade of imaginary horribles,"[26] the article looked hopefully toward a future where "society will be sympathetic to the broader justifications for abortion."[27]

As CLS and its members continued to explore this difficult issue, they came to an increasing awareness that these bold statements in the *Legal Rights of the Fetus* article were profoundly in error. Accordingly, THE CHRISTIAN LAWYER published in 1971 a series of articles questioning the morality, medical necessity, and common law precedent for such decriminalization of abortion.

Following this Court's 1973 decision in *Roe*, many CLS members grappled with the issue, with a significant majority becoming involved in the pro-life movement. But not until October 1992 did CLS take its first affirmative pro-life position, authorizing its Center for Law and Religious Freedom to undertake legal advocacy on abortion and other sanctity of human life issues. Accordingly, in 1993, the

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[24] *See id.*

[25] *See id.* at 31.

[26] *See id.* at 32 ("It is a parade of imaginary horribles to suppose that the enactment of the ALI's proposal or even the ACOG proposal on justified termination of pregnancy will evoke 'abortion mills and meccas' in any state.").

[27] *See id.*

Center expanded its mission to include defending the sanctity of human life from conception to natural death.

For the Christian Legal Society and many of its members, the Supreme Court's decision did not "resolve . . . the intensely divisive controversy reflected in *Roe*."[28] Rather, *Roe* severely truncated the normal legal process that was proceeding to address the controversial law of abortion in a careful lawyerly manner, and instead constitutionalized the law of abortion based upon a set of facts that are no longer true today (if they ever were).[29] For example, the *Roe* and *Doe* majority opinions assumed that the decision to abort an unborn child would be made in close consultation with a woman's private physician, yet in striking down the Texas and Georgia laws, and rendering the ALI proposal unconstitutional, *Roe* and *Doe* brought about exactly the opposite result.[30]

Amicus submits that the path that CLS and many of its members have followed – that of reevaluating earlier conclusions in light of continued advances and developments in science, medicine, law, and philosophy – is consonant with what this Court acknowledged in *Casey* would support reexamination, and even overruling, of an earlier Supreme Court decision.[31] *Amicus* further submits that this

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[28] *See Casey*, 505 U.S. at 836 (Joint Opinion).

[29] *See, e.g., McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring) ("But the problem inherent in the Court's decision to constitutionalize abortion policy is that, unless it creates another exception to the mootness doctrine, the Court will never be able to examine its factual assumptions on a record made in court.").

[30] *See McCorvey v. Hill*, 385 F.3d at 851.

[31] *Cf. Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting) ("I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized."); *Hill v. Colorado*, 530 U.S. 703, 791 (2000) (Kennedy, J., joined by Rehnquist, C.J., dissenting) ("The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey*. . . . In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all. . . .").

path and process are consistent with applicable principles of *stare decisis* as recognized in *Casey* and other decisions of this Court. *Amicus* respectfully submits that such reexamination in light of significantly changed facts is not only permitted – indeed, required – by the Constitution and Rule 60(b), it is also profoundly wise.[32]

II. THE ADOPTION OF "SAFE HAVEN" LAWS IN FORTY-SIX STATES, PROVIDING PREGNANT WOMEN WITH AN ALTERNATIVE TO UNWANTED MOTHERHOOD, IS ONE SIGNIFICANT CHANGED MATERIAL FACT THAT REQUIRES GRANTING THE PETITION AND ORDERING CONSIDERATION OF PETITIONER'S RULE 60(b) MOTION AND EVIDENCE.

Among the many material facts that have "changed from those which furnished the claimed justifications for the earlier constitutional resolutions"[33] in *Roe v. Wade*, the enactment in forty-six states since 1999 of "Safe Haven" or "Baby Moses" laws is particularly significant. Such laws afford a woman the right to safely relinquish an unwanted newborn child into appropriate care (the "safe haven") while remaining anonymous and without fear of criminal or civil liability.[34]

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[32] "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

[33] *See Casey*, 505 U.S. at 863 (Joint Opinion).

[34] *See* ALA. CODE §26-25-1 (2000); ARIZ. REV. STAT. §13-3623.01 (2001); ARK. CODE ANN. §9-34-202 (2001); CAL. HEALTH & SAFETY CODE §1255.7 (2000); COLO. REV. STAT. §19-3-304.5 (2000); CONN. GEN. STAT. §17a-57 *et seq.* (2000); DEL. CODE ANN. Tit. 16 §907A (2001); FLA. STAT. ANN. §383.50 *et seq.* (2000); GA. CODE ANN. §19-10A-1 *et seq.* (2002); IDAHO CODE §39-8201 *et seq.* (2001); 325 ILL. COMP. STAT. 2/1 *et seq.* (2001); IND. CODE §31-34-2.5-1 *et seq.* (2000); IOWA CODE §233.1 *et seq.* (2001); KAN. STAT. ANN. §38-15,100 (2000); KY. REV. STAT. ANN. §405.075 (2002); LA. CH. CODE art. 1151 (2000); ME. REV. STAT. ANN. Tit. 17-A §553 (2002); MD. CODE ANN. CTS. & JUD. PROC. §5-641 (2002); MASS. GEN. LAWS ch. 119 §39 1/2 (2004); MICH. COMP. LAWS §750.135

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These "Safe Haven" laws provide mechanisms that address the specific harms that the *Roe* majority opinion stated would result from denying a pregnant woman the choice to terminate her pregnancy:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. *Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.*[35]

All of these harms, except the first, arise not from pregnancy *per se* but rather from motherhood and child care. And all of these harms are addressed by the availability of a safe haven mechanism to enable a woman to relinquish an unwanted newborn to a safe haven.

(2000); MINN. STAT. §145.902 (2000); MISS. CODE ANN. §43-15-201 *et seq.* (2001); MO. REV. STAT. §210.950 (2002); MONT. CODE ANN. §40-6-401 *et seq.* (2001); NEV. REV. STAT. §43b.630 (2004); N.H. REV. STAT. ANN. §132-A (2004); N.J. STAT. ANN. §30:4C-15.7 (2004); N.M. STAT. ANN. §24-22-1 *et seq.* (2004); N.Y. PENAL §260.03, N.Y. PENAL §260.15, and N.Y. SOC. SERV. §372-g (2000); N.C. GEN. STAT. §7B-500 (2001); N.D. CENT. CODE §50-25.1-15 (2001); OHIO REV. CODE ANN. §2151.3515 *et seq.* (2001); OKLA. STAT. Tit. 10 §7115.1 (2001); OR. REV. STAT. §418.017 (2001); 13 PA. STAT. ANN. Tit. 23 §6501 *et seq.* (2002); R.I. GEN. LAWS §23-13.1-1 *et seq.* (2001); S.C. CODE ANN. §20-7-85 (2000); S.D. CODIFIED LAWS §25-5A-27 *et seq.* (2001); TENN. CODE ANN. §68-11-255 (2001); TEX. FAM. CODE ANN. §262.301 *et seq.* (1999); UTAH CODE ANN. §62A-4a-801 *et seq.* (2001); VA. CODE ANN. §18.2-371.1 (2004); WASH. REV. CODE §13.34.360 (2002); W. VA. CODE §49-6E-1 *et seq.* (2000); WIS. STAT. ANN. §48.195 (2001); WYO. STAT. ANN. §14-11-101 *et seq.* (2003).

[35] 410 U.S. at 153 (emphasis added). *Cf. Casey*, 505 U.S. at 853 (one view on the abortion issue "is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent.").

These forty-six Safe Haven laws vary substantially from state to state, but all share key elements in common. Two of the most important common elements are: (1) they allow a mother to anonymously relinquish an unharmed infant[36] without fear of prosecution and/or conviction for such action, and (2) they empower the recipient (the safe haven provider) to provide services, such as needed medical attention, to the infant. The primary features of these laws are outlined below.

A. Safe Haven Laws Provide A Reasonable Period Of Time For A Mother To Relinquish An Unwanted Infant To A Safe Haven.

Because relinquishment of the infant is not required immediately upon birth, the mother is afforded time to fully and thoughtfully consider her decision. Fourteen states permit relinquishment of an infant of seventy-two hours of age or less.[37] Other common maximum ages for relinquishment are five days, seven days, and thirty days.[38] At the extreme, one state permits relinquishment of an infant aged ninety days or less, and one state permits

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[36] State Safe Haven laws use varying terms to refer to the relinquished newborn child, including "infant," "baby," "newborn infant," "newborn," and "child." *See, e.g.*, DEL. CODE ANN. Tit. 16 §907A (2001) ("baby"); FLA. STAT. ANN. §383.50 (2000) ("newborn infant"); ME. REV. STAT. ANN. Tit. 17-A §553 (2002) ("child"); MD. CODE ANN. CTS. & JUD. PROC. §5-641 (2002) ("newborn"). In this brief, *amicus* will refer to a relinquished newborn as an "infant."

[37] *See* ALA. CODE §26-25-1 (2000); ARIZ. REV. STAT. §13-3623.01 (2001); CAL. HEALTH & SAFETY CODE §1255.7 (2000); COLO. REV. STAT. §19-3-304.5 (2000); FLA. STAT. ANN. §383.50 (2000); KY. REV. STAT. ANN. §405.075 (2002); MD. CODE ANN. CTS. & JUD. PROC. §5-641 (2002); MICH. COMP. LAWS §712.1 (2000); MINN. STAT. §145.902 (2000); MISS. CODE ANN. §43-15-201 (2001); OHIO REV. CODE ANN. §2151.3516 (2001); TENN. CODE ANN. §68-11-255 (2001); UTAH CODE ANN. §62A-4a-801 (2001); WIS. STAT. ANN. §48.195 (2001).

[38] *See, e.g.*, MO. REV. STAT. §210.950 (2002); OKLA. STAT. Tit. 10 §7115.1 (2001); IDAHO CODE §39-8203 (2001).

relinquishment of an infant less than one year of age.[39] In this way, the state Safe Haven laws allow a reasonable window of time for a mother to relinquish an unwanted child and avoid any perceived burdens of motherhood, as identified by the *Roe* majority.[40]

B. Safe Haven Laws Permit The Mother (And Others) To Relinquish An Unwanted Infant To A Safe Haven.

Safe Haven laws are clearly (and in some cases expressly) intended to relieve the mother of the physical, psychological, and other perceived burdens of caring for an unwanted child. Accordingly, under every existing state Safe Haven law, the mother may relinquish her infant.[41] In some states *only* the mother may relinquish the infant.[42] In all states that allow persons other than the mother to relinquish the infant, either parent may relinquish the infant to a safe haven provider, though some states require that relinquishment be with the approval of the mother.[43] A small minority of states permit any person to relinquish an infant.[44]

C. Minimal Effort Is Needed For The Mother To Place A Newborn Infant With A Safe Haven.

Each state Safe Haven law specifically identifies the entities (the "safe haven") that may receive a relinquished

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[39] N.M. STAT. ANN. §24-22-2 (2004); S.D. CODIFIED LAWS §25-5A-27 (2001).

[40] In addition, some states, such as California, expressly set forth in the Safe Haven statute a process for the mother to reclaim a relinquished infant. *See, e.g.*, CAL. HEALTH & SAFETY CODE §1255.7 (2000) (procedure for relinquishing person to request return of infant relinquished prior to filing of a petition to terminate parental rights).

[41] *See supra* note 34.

[42] *See* GA. CODE ANN. §19-10A-4 (2002); TENN. CODE ANN. §68-11-255(b)(3) (2001).

[43] *See, e.g.*, MD. CODE ANN. CTS. & JUD. PROC. §5-641(a)(2) (2002).

[44] *See, e.g.*, N.J. STAT. ANN. §30:4C-15.7 (2004).

infant. Such safe haven locations and entities are readily accessible to mothers, in many states even more accessible than abortion providers. The most common safe haven designation is a medical service provider, such as a licensed hospital or its staff while on duty, but designees in some states also include law enforcement officers, fire stations, child welfare agencies and even calls to 911. Only the state of New York varies notably, providing generically for an infant to be left with an "appropriate person" or in a "suitable location" with the relinquishing person then required to notify an "appropriate person" of the infant's location.[45] With designated safe havens so readily accessible, minimal burden is placed upon a mother in relinquishing an infant.

D. Immediately Upon Relinquishment To A Safe Haven, The Mother Is Relieved Of Responsibility For An Infant's Care.

Upon relinquishing an infant to a safe haven, the mother is legally relieved of responsibility for the care and protection of the infant and that responsibility is placed upon the safe haven. Many of the statutes state that the safe haven must perform any act necessary to protect the health and safety of the infant.[46] (Such an express duty is in addition to any common law duty that one would owe to an infant in its custody.) However, the majority of states also relieve the safe haven and its employees of any civil or criminal liability for any acts or omissions made in good faith under the state's Safe Haven law.[47] In any event, in no instance does the mother retain any liability with regard to the future care and protection of the child once the child has been relinquished to the safe haven.

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[45] N.Y. PENAL §260.03 (2000).

[46] *See, e.g.*, ALA. CODE §26-25-1(b) (2000); ARK. CODE ANN. §9-34-202(b); COLO. REV. STAT. §19-3-304.5(2)(a) (2000).

[47] *See, e.g.*, GA. CODE ANN. §19-10A-7 (2002); 325 ILL. COMP. STAT. 2/27.

E. The Mother Of A Relinquished Infant May Choose To Remain Anonymous.

The mother of a relinquished infant is under no legal compulsion to identify herself when relinquishing an infant to a safe haven. Virtually every Safe Haven law allows for the person delivering the abandoned infant to remain anonymous, if the person chooses.[48]

These Safe Haven laws provide a mother the opportunity for an extended period of time to consider whether to relinquish an unwanted infant. The available choice of anonymous relinquishment protects a mother's privacy and relieves her of any legal responsibility of maternity, while providing safe care for the unwanted infant under the control of the state. These laws provide mechanisms that address the specific harms that the *Roe* majority opinion believed would result from denying a pregnant woman the choice to terminate her pregnancy.[49] "[G]overnment programs offer

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[48] Only Georgia requires that the delivering person be the mother with "proof of identification *if available*." *See* GA. CODE ANN. §19-10A-1 *et seq.* (2002) (emphasis added).

[49] The only one of these harms that is not directly addressed by the state Safe Haven laws is the first – "[s]pecific and direct harm medically diagnosable even in early pregnancy." *Roe*, 410 U.S. at 153. But this harm arises only if there is an absolute ban on all abortions – the laws invalidated in *Roe* and *Doe*, as well as the ALI model proposal discussed above, all contained exceptions in the event that the pregnancy posed a risk of specific and direct harm to the mother's life.

Similarly, some might object that Safe Haven laws only eliminate the harms of *maternity*, but not of *pregnancy*, as the mother cannot relinquish an infant prior to its birth. As the *Roe* Court recognized, the fundamental right unique to a woman is the relationship between mother and child. The very constitutional interest that the mother has in her maternity or the termination of her maternity – which is the same interest – requires that the mother be in a setting where she is free from coercion and compulsion in determining whether or not to terminate that interest. Justice Blackmun's opinion in *Roe* assumes that the mother can make a fully informed and uncoerced decision to terminate her maternity prior to the birth of her child. But this assumption is inconsistent with other areas of the law. For example, a number of states do not permit a mother to irrevocably commit her

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medical care, social services, and even, through 'Baby Moses' laws in over three-quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted."[50]

The enactment of Safe Haven laws in forty-six states (to date) constitutes a significant changed material fact not in existence, or even envisioned, at the time *Roe* was decided in 1973. Indeed, this change has occurred entirely after this Court's subsequent decision in *Casey*, and even in large part after the decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), as the first Safe Haven law was enacted in 1999, and fewer than fourteen were enacted prior to 2001.[51] This changed material fact is one of many that strongly support reconsideration of *Roe* as Petitioner's Rule 60(b) motion requests.

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child to be adopted prior to birth, and recognize a right to withdraw or revoke consent to adoption for a limited time after the child is born, *see, e.g.*, ALA. CODE § 26-10A-13 (2004), recognizing that birth of the child may alter the mother's decision. It may be logical to link pregnancy with maternity as Justice Blackmun did if, as a practical matter, a mother's decision not to terminate her pregnancy creates a high probability that she will be unable to terminate her maternity after the child is born – in other words, if she cannot reasonably be certain that she can relinquish her child if she determines upon birth that she does not want the child. But in a "Safe Haven" legal regime, the mother may always anonymously relinquish her child to a safe haven provider for a reasonable period following birth, and thereby be relieved of any obligations of maternity. Thus, in a "Safe Haven" legal regime, a mother is free of the compulsions associated with maternity.

[50] *McCorvey v. Hill*, 385 F.3d at 850 (Jones, J., concurring) (footnote omitted).

[51] The first "Safe Haven" law was enacted in Texas on June 19, 1999, one year prior to issuance of the *Stenberg* decision in June 2000. The Texas law became effective September 1, 1999. *See generally* TEX. FAM. CODE ANN. §262.301 (1999). More than thirty-two of the forty-six state "Safe Haven" laws currently in effect were enacted after the year 2000. *See supra* note 34.

III. *CASEY* AND *AGOSTINI* PROVIDE THE CONSTITUTIONAL PRINCIPLES PERMITTING THIS COURT TO GRANT THE PETITION AND ORDER THE DISTRICT COURT TO DETERMINE AFTER AN EVIDENTIARY HEARING UNDER RULE 60(b) WHETHER PROSPECTIVE APPLICATION OF *ROE* IS JUST AND EQUITABLE.

This Court's decisions in *Agostini* and in *Casey* provide the critical constitutional principles that permit this Court to grant the petition. First, *Agostini* and *Casey* both articulate the principle that significant changes in the facts or law underlying an earlier constitutional decision of this Court warrant revisiting and even reversing that decision.[52] Second, from *Casey* comes the corollary that such action may be required not only by changes in the facts *per se*, but also by changes in factual understandings, in the way that such facts have come to be seen or understood.[53] Finally, *Agostini* establishes that Rule 60(b)(5) is an appropriate mechanism for a *party* to the earlier decision to seek such reexamination and reversal.[54]

In *Casey*, although presented with none of the compelling medical, scientific, psychological, testimonial and other evidence that Petitioner now seeks to provide, the Court, while reaffirming *Roe*'s "central holding," nevertheless adjusted the requirements of *Roe* and overruled parts of several earlier rulings that had extended *Roe*'s application. Petitioner's Rule 60(b)(5) motion now seeks to submit for consideration by the courts (and ultimately by this

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[52] *See Agostini*, 521 U.S. at 215; *Casey*, 505 U.S. at 854-55, 863 (Joint Opinion). *See also Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), on basis of, *inter alia*, changes in psychological knowledge).

[53] *See Casey*, 505 U.S. at 854 (Joint Opinion) (overruling earlier constitutional decision warranted where "facts have so changed, *or come to be seen so differently*, as to have robbed the old rule of significant application or justification") (emphasis added).

[54] *See Agostini*, 521 U.S. at 238-40.

Court[55]) precisely what was not considered in *Casey*: "serious and substantial evidence . . . that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child."[56] Significant among this evidence is the adoption, subsequent to *Roe* and *Casey* and largely subsequent to *Stenberg*, of state Safe Haven laws that directly address the harms relied upon in *Roe*. Granting *certiorari* will allow this Court the opportunity, missing in *Casey*, to thoroughly and thoughtfully consider the substantial changes in the medical, scientific, psychological, and other facts and factual understandings regarding abortion in America.

Petitioner contends, and *amicus* Christian Legal Society agrees, that these changed facts and factual understandings demonstrate that prospective application of *Roe* is no longer just or equitable. But this Court need not resolve that question to grant *certiorari*. Indeed, this Court may not yet have a sufficient factual record upon which to resolve such a question – as it would if Petitioner were allowed to proceed with her Rule 60(b) motion in the District Court. Consequently, *amicus* respectfully urges this Court to grant the petition, vacate the rulings below, and remand this case to the District Court with instructions to conduct an evidentiary hearing and determine in the first instance whether there are significant changes in the facts and factual understandings underlying the *Roe* decision that make its prospective application unjust or inequitable.

CONCLUSION

For the foregoing reasons, *amicus curiae* Christian Legal Society respectfully urges this Court to grant the petition for a writ of *certiorari*.

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[55] Consistent with *Agostini*, the ultimate determination whether to overrule or modify *Roe* obviously must rest with this Court. *See Agostini*, 521 U.S. at 237-38.

[56] *See McCorvey*, 385 F.3d at 850 (Jones, J., concurring).

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